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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

JOSEPH HERNANDEZ,

Petitioner,

v.

CLARK E. DUCART, Warden,

Respondent.

Case No. EDCV 13-1767-PA (LAL)

**ORDER ACCEPTING REPORT AND  
RECOMMENDATION OF UNITED  
STATES MAGISTRATE JUDGE AND  
DENYING CERTIFICATE OF  
APPEALABILITY**

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, the Magistrate Judge's Report and Recommendation, Petitioner's Objections to the Report and Recommendation, and the remaining record, and has made a *de novo* determination.

In his Objections, Petitioner argues the state court erred in failing to conduct an evidentiary hearing on Petitioner's ineffective assistance of counsel claim, thus rendering the state court's fact-finding process deficient for purposes of 28 U.S.C. § 2254(d)(2) (habeas relief shall not be granted unless the state court proceedings "resulted in a decision that was based on an unreasonable determination of the facts"). (Objections at 8-14.) However, "a state court [need not] conduct an evidentiary hearing to resolve every disputed factual question," and no such hearing is required where the record precludes habeas relief.<sup>1</sup> Here, this Court has concluded that the record precludes habeas relief, both because Petitioner has not provided

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<sup>1</sup> See Hibbler v. Benedetti, 693 F.3d 1140, 1147-48 (9th Cir. 2012).

1 evidentiary support for his claim and because any potential ineffective assistance of counsel was  
2 harmless. Thus, the state court's denial of Petitioner's claim without an evidentiary hearing did  
3 not offend 28 U.S.C. § 2254(d)(2).

4 To the extent Petitioner faults this Court for failing to hold an evidentiary hearing on his  
5 ineffective assistance of counsel claim, his argument also fails. An evidentiary hearing is not  
6 warranted in federal court where, as here, "the record refutes the applicant's factual allegations  
7 or otherwise precludes habeas relief."<sup>2</sup>

8 Petitioner's remaining arguments presented in the Objections generally lack merit for the  
9 reasons set forth in the Report and Recommendation.

10 Accordingly, IT IS ORDERED THAT:

- 11 1. The Report and Recommendation is approved and accepted;  
12 2. Judgment be entered denying the Petition and dismissing this action with  
13 prejudice; and  
14 3. The Clerk serve copies of this Order on the parties.

15 Additionally, for the reasons stated in the Report and Recommendation, the Court finds  
16 that Petitioner has not made a substantial showing of the denial of a constitutional right.<sup>3</sup> Thus,  
17 the Court declines to issue a certificate of appealability.



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20 DATED: May 13, 2016,

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HONORABLE PERCY ANDERSON  
UNITED STATES DISTRICT JUDGE

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28 <sup>2</sup> Schiriro v. Landrigan, 550 U.S. 465, 474, 127 S. Ct. 1933, 167 L. Ed. 2d 836 (2007).

<sup>3</sup> See 28 U.S.C. § 2253; Fed. R. App. P. 22(b); Miller-El v. Cockrell, 537 U.S. 322, 336, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003).